

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY TAFOYA,

Petitioner,

No. CIV S-05-0824 FCD GGH P

vs.

J. Yates, Warden, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

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Petitioner, proceeding with appointed counsel, has moved for a stay and abeyance of the first amended petition, filed on January 13, 2006, for the purpose of exhausting three new claims to which respondent, on February 7, 2006, has filed a statement of non-opposition. The new, unexhausted claims include the following: Claim 8 — Ineffective assistance of appellate counsel who failed to notice or raise on direct appeal the trial court's failure to instruct the jury with CALJIC 2.90 which informs the jury of the presumption of innocence and defines proof beyond a reasonable doubt; Claim 9 — Denial of due process of law by the trial court's failure to instruct the jury on the principles of the presumption of innocence and to define the prosecution's burden of proof of beyond a reasonable doubt; and Claim 10 — Violation of petitioner's right to a jury trial under the Sixth Amendment in the trial court's failure to instruct the jury on the principles of the presumption of innocence and to define the prosecution's burden

1 of proof of beyond a reasonable doubt.

2 Respondent states that the California Supreme Court should be given an  
3 opportunity to determine whether there has been a violation of state law set forth in the new  
4 claims, but does not thereby concede that these as-yet-unexhausted claims are not subject to  
5 procedural bars or that they are timely. Rather, respondent avers that these issues can be  
6 addressed upon the lifting of any stay.

7 As respondent posits no objection to a stay and abeyance of this matter, raising no  
8 question as to whether good cause has been shown for bringing the claims at this point or  
9 challenging the claims on the merits, the court will recommend that the matter be stayed pending  
10 exhaustion of the new claims enumerated above. See Rhines v. Weber, 544 U.S. 269, 125 S. Ct.  
11 1528 (2005). However, petitioner should be required to notify the court within thirty days of a  
12 decision by the state supreme court as to the claims at issue so that the stay may be lifted and this  
13 matter proceed.

14 Accordingly, IT IS HEREBY RECOMMENDED that:

15 1. Petitioner's unopposed motion for a stay and abeyance, filed January 13, 2006,  
16 be granted and this matter be stayed pending exhaustion of Claims 8, 9, and 10, as set forth  
17 above; and

18 2. Petitioner be directed to file a notice to this court of exhaustion of his state  
19 court remedies as to Claims 8, 9, and 10, within thirty days of the filing of the decision by the  
20 state supreme court.

21 These findings and recommendations are submitted to the United States District  
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days  
23 after being served with these findings and recommendations, any party may file written  
24 objections with the court and serve a copy on all parties. Such a document should be captioned  
25 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
26 shall be served and filed within ten days after service of the objections. The parties are advised

1 that failure to file objections within the specified time may waive the right to appeal the District  
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: 3/13/06

4 /s/ Gregory G. Hollows

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6 GREGORY G. HOLLOWS  
7 UNITED STATES MAGISTRATE JUDGE

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